

REMARKS

The Final Office Action mailed June 30, 2008 has been carefully considered.
Reconsideration in view of the following remarks is respectfully requested.

Canceled Claims

Claims 3-24 and 28-31 have been canceled without prejudice or disclaimer of the subject matter contained therein.

Claim Objections

Claims 1 and 32 have been amended in accordance with the Examiner's suggestions in order to overcome the objections thereto. Claim 28 has been canceled.

Rejection(s) Under 35 U.S.C. §112, First Paragraph

Claims 28-35 stand rejected under 35 U.S.C. §112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains or with which it is mostly nearly connected, to make and/or use the invention. Claim 35 has been amended to remove reference to a control computer. Claim 28 has been canceled.

Rejection(s) Under 35 U.S.C. §112, Second Paragraph

Claims 1 and 25-35 stand rejected under 35 U.S.C. §112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Claims 1 and 35 have been amended to change "bit error

rate” to “error rate” for compatibility with the dependent claims which provide more specific examples of the error rate.

Rejection(s) Under 35 U.S.C. §102

Claims 1 and 25-27 stand rejected under 35 U.S.C. §102(e) as allegedly being anticipated by Hou (U.S. pat. no. 6,898,755). Applicants respectfully traverse.

Claim 1 recites, *inter alia*,

monitoring the error rate of transmissions from each CM, and if the error rate of any CM becomes higher than an underperformance limit or lower than an overperformance limit, sending a message to said CM whose error rate has become too high or too low causing each said CM which is overperforming or underperforming to switch to an upstream channel with a burst profile which is compatible with the CM modem type and suitable for more efficient communications of digital data between said CMTS and said CM. (Emphasis added)

The above features from claim 1 and particularly, the emphasized language, are not disclosed in Hou. As best described in the Summary portion, the procedure in the Hou patent relates to enabling the CMTS to assign burst profiles mini-slot numbers to CMs according to the CMs’ robustness level. The CM determines whether or not the CM is dynamic burst profile mode capable. If so, the CMTS assigns a burst profile based on performance measurements on the CM and grants the CM a number of mini-slots per the burst profile parameters and the CM’s request. Otherwise, if the CM is not dynamic burst profile capable, the CMTS assigns a burst profile per the current DOCSIS specification and assigns a number of mini-slots per the CM’s request. Importantly, there is no mention in Hou of “sending a

message to said CM whose error rate has become too high or too low,” of said message “causing each said CM which is overperforming or underperforming to switch to an upstream channel with a burst profile which is compatible with the CM modem type and suitable for more efficient communications of digital data between said CMTS and said CM.” In fact the adjustments made in Hou relate to the robustness of the burst profile assigned to each CM, with some CMs requiring higher robustness for their burst profile than others. This is unrelated to sending messages to the CMs that cause them to switch to different upstream channels with suitable burst profiles.

It will be appreciated that according to the M.P.E.P., a claim is anticipated under 35 U.S.C. § 102 only if each and every claim element is found, either expressly or inherently described, in a single prior art reference.¹ The aforementioned reasons clearly indicate the contrary, and withdrawal of the 35 U.S.C. § 102 rejection based on Hou is respectfully urged.

Rejection(s) Under U.S.C. § 103(a)

Claims 28-35 stand rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Hou. Claims 28-31 have been canceled and the resection thereof is moot. Claim 32 recites similar features to claim 1. As explained above these features are neither taught nor suggested by Hou, and claim 32, along with claims 33-35 dependent therefrom, is patentable over Hou.

¹ Manual of Patent Examining Procedure (MPEP) § 2131. See also *Verdegaalll Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

Conclusion

In view of the preceding discussion, Applicant respectfully urge that the claims of the present application define patentable subject matter and should be passed to allowance.

If the Examiner believes that a telephone call would help advance prosecution of the present invention, the Examiner is kindly invited to call the undersigned attorney at the number below.

Please charge any additional required fees, including those necessary to obtain extensions of time to render timely the filing of the instant Amendment and/or Reply to Office Action, or credit any overpayment not otherwise credited to our deposit account no. 50-1698.

Respectfully submitted,
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Dated: 12/01/08

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